

CAL-OSHA ADVISORY
COMMITTEE
MINUTES of MEETING
November 4, 2010



Department of Industrial Relations
John Duncan, *Director*

Division of Occupational Safety & Health

Len Welsh, Chief

Chris Lee, *Deputy Chief* of Cal/OSHA Enforcement
Edward F. Callanan, *Assistant to the Chief*
(510) 286-7000

Cal/OSHA ADVISORY COMMITTEE
MINUTES OF MEETING – November 4, 2010

Elihu Harris State Building
1515 Clay Street, Suite 1304
Oakland, California

OPENING REMARKS

Len Welsh called the meeting to order at 10:00 am. Mr. Welsh announced that the next meeting of this committee will be held in Oakland on January 6, 2011 in the Elihu Harris State Building, Suite 1304, starting at 10am. After that the schedule of meetings are tentatively set as follows, March 3 in Los Angeles, May 5 in Fresno, July 7 in Oakland, September 1 in Los Angeles and November 3 in Oakland all meeting will be called to order at 10:00am.

ADMINISTRATIVE REPORT

- 1) DOSH should have a favorable budget for the current fiscal (2010-11) year compared to agencies supported by General Fund. In essence we should be maintaining the same dollar support from special funds this year as for last, with the addition of additional federal funding for three budget change proposals approved to provide for an expanded training unit, a new Bakersfield District Office, and a “Medical /Toxicology Unit” that will support permissible exposure limit rulemaking and inspection activity requiring physician or nurse expertise. It is our hope that the Federal funding will be permanent.
- 2) Federal OSHA has completed its enhanced annual monitoring evaluation (EFAME) of Cal/OSHA. The term “enhanced” has been used because of the more comprehensive nature of the audit this year for all State Plan States in the aftermath of the Nevada experience. The Federal evaluation of Cal/OSHA, together with Cal/OSHA’s detailed responses, can be found on the Department of Industrial Relation’s (DIR) website. A copy of Director Duncan’s letter to Ken Atha, together with a one-page summary sheet, is enclosed with these minutes.

California appreciates the EFAME, intends to address all issues legitimately identified, and will continue its dialogue with the Federal OSHA in areas we don’t agree.

One of the areas of difference of opinion involves the targeting of High Hazard places of employment. The EFAME analysis faults Cal/OSHA for a low rate of serious violations in high hazard inspections, but assumes that all “programmed” inspections should be evaluated as “high hazard” inspections, with which we disagree. While our high hazard inspections deliver equal or better rates of serious violation issuance than the national average, our programmed inspections produce a much lower percentage, for good reason. For example, the inspections by our Process Safety Management unit (which deals primarily with refineries and other large-scale chemical manufacturers) are finding very low rates of serious violations, due in large measure to our high level of onsite presence and the fact that these employers demonstrate a high degree of compliance.

We want it to stay that way, because the results of non-compliance tend to be so catastrophic in these industries.

Another area of concern cited in the audit is the timelines of our response to complaints, which we believe can and should be improved. One problem in this area is Cal/OSHA's long standing interpretation of Labor Code section 6309's requirement to investigate within specified time frames in response to "formal" complaints. Our formal Chief Counsel felt that this section requires an onsite inspection in response to each of these complaints. Mr. Welsh stated his disagreement with this interpretation, because it elevates the status of a complainant over the urgency of responding to information that employees may be exposed to a hazard. The degree of seriousness or imminence of the hazard about which we receive information should be the determinant of how we prioritize the complaint and how quickly we respond with an onsite inspection, not who has reported the hazard to Cal/OSHA.

The new law AB 2774, is related to the EFAME in that it pertains to CAL/OSHA's approach to the classification of violations as serious. This bill completely revises the state's approach to how a serious violation is cited by Cal/OSHA. It removes the basic formula which held that a violation is serious if there is a "substantial probability" that death or "serious physical harm" will occur should the violation result in an accident. That formula is replaced with the rule that a violation is serious if there is a "realistic possibility" that death or "serious physical harm" could be caused the "actual hazard" created by a violation. In addition, among other things, the bill:

- defines serious physical harm statutorily for the first time.
- requires Cal/OSHA to notify the employer in writing at least 15 days before it issues a serious citation that Cal/OSHA intends to issue a serious violation and what the allegation will be.
- requires Cal/OSHA to make a reasonable attempt to determine and consider whether the employer may qualify for an affirmative defense to any serious citation it intends to issue before issuing.
- clarifies and adds specifics to an employer's affirmative defense to a serious classification.
- requires the trier of fact at hearing to accept as a competent witness, on each element of a serious violation, a Cal/OSHA safety engineer or industrial hygienist whose Cal/OSHA-mandated training is current.

3) Jon Wroten, Staff Services Manager III reported the following:

The Division has had to face significant administrative challenges over the past eighteen months, including mandatory work furloughs, five percent reduction in staff and 15% reduction in vehicles, a 'hard' hiring freeze, etc. Some unions have reached agreement with the current administration on increased employee retirement contributions and self

directed time off which allows our office to be open every day (Monday-Friday). For unions that have not reached agreement with the current administration there continues to be three days a month furloughs. There is no speculation as to labor negotiations with either the present or future administration.

This past summer Cal/OSHA partnered with the Economic and Employment Enforcement Coalition (EEEC) which targets the underground economy and utilizes a different method in its approach to heat sweeps. Such sweeps have resulted in the following:

Inspections:

- 2688 - Heat Inspections
- 494 - Section 3395 violations
- 1600 - heat outreach activities

Violations by Industry:

- 228 - Construction
- 158 - Agriculture
- 45 - Services (i.e. landscaping)
- 63 - Scattered between 7 other industry categories)

Violations:

- 716 - Violations cited
- 483 - Lack of written programs
- 118 - Lack of employee training
- 59 - No water
- 40 - No shade
- 16 - Lack of supervisor training

Fatalities:

There were no confirmed Heat fatalities in 2010, but we are waiting for the coroner's report on 5 cases. Significant impacts have been made in the agricultural industry with approximately 85% of the employers observed being in-compliance in recent sweeps. Approximately 4 or 5 orders prohibiting use were issued this year. The EEEEC sweeps have proven to be very effective so they have been given the lead in inspections for heat sweeps this year.

5 possible that we are investigating

- 2 Agriculture
- 1 Construction
- 1 Manufacturing
- 1 Landscaping

It should be noted that the Division received a 50/50 matched fund grant for the American Recovery and Reinvestment Act (ARRA), which involved primarily highway construction and infrastructure project inspections funded by ARRA. As a result of this program we conducted 1155 inspections with 1446 violations cited, of which 383 were found to be serious and 1061 were other than serious and 2 repeat violations that were deemed to be non-serious. Penalties assessed totaled approximately \$1.7 million. ARRA was a program of 15 months

effective July 1, 2009 and is now terminated. We have submitted our final report to the Federal government.

ENFORCEMENT REPORT

Alan Traenkner, Special Assistant to the Chief of DOSH, reported the following Enforcement report for Chris Lee, Deputy Chief for Enforcement, who was unable to attend this meeting.

- 1) The Division successfully concluded work under the American Recovery and Reinvestment Act grant which was active from July 1, 2009 through September 30, 2010.. Over 1,000 inspections were conducted, in excess of 300 serious violations were cited, and the federal grant funds and state matching funds were fully expended.
- 2) Total inspections conducted by DOSH at the end of the Federal fiscal year (9/30/10) was 8827, which was down from historical levels due 15% less staff work hours due to furloughs. The previous year's total was 8500.
 - a. 13840 hazards were found this year
- 3) With regard to enforcement of the heat program it should be noted that field staff were instructed not to conduct heat inspections on every site but rather "eyeball" each site and if it was apparent that shade was up, water available and no other apparent violation was seen that the inspector should move on to the next site so that obvious violators could be inspected and cited. This practice represents a change in philosophy since we cannot inspect every agricultural and construction worksite and the fact that compliance, particularly in agriculture has taken a dramatic swing upward.
- 4) This year to date we have issued 27 citations for willful violations with the possibility of more to come as some inspections started this year are not yet completed. There were 9 willful citations issued last year.
 - a. 48 repeat violations were cited this year as compared to 63 last year.
 - b. 2457 citations have been issued to date this fiscal year for serious violations
 - c. 11,308 general citations have been issued in the 2010 fiscal year thus far compared to 13404 in the past completed fiscal year.
- 5) Significant cases of the interest include:
 - a. The David Shaw concrete and Block Corporation where our Los Angeles office assessed penalties totaling \$128,945, including one willful violation cited. The circumstances included planks being laid on the forks of a loader, unsecured, that was to be used as a work platform which resulted in a worker falling 15 feet to his death. It is frustrating to see an accident occur where it should be evident to everyone that a person cannot stand on unsecured forks and planks. The citation in this case was issued on September 8, 2010.
 - b. A willful violation was issued to the Agilex Flavors and Fragrance Company relating to diacetyl. Our special emphasis programs for employer working with

- c. As a matter of information, contrary to news media reports concerning drilling in the Caldecott Tunnel in the East Bay, the tunnel did not collapse, but a piece of concrete grout fell and injured an employee.
- 6) Reference was made to a handout related to training courses for DOSH personnel, a copy of which is enclosed with these minutes. Thus far we have provided training to 773 individuals on such topics as accident investigations and investigation interviewing techniques since the emphasis program was initiated in January of 2010. The initial compliance course and two presentations of the Health Standards course have been completed and this week we are again offering the safety standards course.

We had scheduled a course in inspection techniques and legal aspects, considered to be a critical tool for those in our enforcement unit, but it had to be postponed from October to December 6, because of the enactment of AB 2774. The delay will allow us to provide information to attendees on how we are to conform our operation to the new law. It was pointed out that the course deals with legal sufficiency, evidence collection techniques etc. not specifically with AB 2774. It is our goal to run all of our field, management, and administrative staff through this course, so initially all classes will be filled. Future courses being planned, once the mandatory classes described above are completed include technical offering in such subjects as machine guarding.

- 7) Mr. Traenkner introduced Mr. Van Howell, newly appointed Area Director for Federal OSHA and assigned to its Oakland office. Mr. Howell, as one of his duties will monitor the Cal/OSHA program. Mr. Traenkner noted that Mr. Howell started working for him in 1987 and has admired his qualities and work ethics. Mr. Howell stated that Federal OSHA has reorganized and once again has established five area offices, as follows, Honolulu, Las Vegas, Phoenix, San Diego and Oakland. The San Diego office will not be involved in monitoring Cal/OSHA.
- 8) Mr. Traenkner stated that since he came to Cal/OSHA he has been most impressed by stakeholders' involvement, of which he was not fully aware, but it is outstanding.

CONSULTATION SERVICE REPORT

In the absence of Vicky Heza, Program Manager, Cal/OSHA Consultation Service, Michael Alvarez, Regional Manager, gave the following report after Mr. Welsh announced Mr. Alvarez's impending retirement after more than three decades of service and commending Mr. Alvarez for his many accomplishments, and who provided extraordinary assistance to Dave Bare, the former program manager. Together they acted positively to recruit employers into the various programs, which they conceived, such as the Golden Gate Programs plan,

SHARP, etc. and having done so, raised the consultation service to national prominence, as recognized by their receiving three Federal "Oscars". In addition, their creative ideas, have given rise to similar programs in other states. Mr. Welsh wished Mr. Alvarez a long, happy and healthy retirement, and noted that he will truly be missed, noting it was the end of an era. Mr. Alvarez thanked Mr. Welsh for his kind words.

Mr. Alvarez referred to a handout relating to redirecting and emphasizing of the Consultation website showing the evolutionary nature of the work. A copy of the handout is enclosed with these minutes. He noted that the three Oscars awarded to the Service pertained to three separate projects and related to residential, wild fires and Hispanic outreach projects. It was noted that the Consultation Services achieved 100% of the goals set for itself in this fiscal year, despite the furloughs and other impediments, there were approximately 2700 on site consultations, which was 9% less than before the furloughs. Consultation has redirected its emphasis to the agricultural industry and has achieved a record of approximately 400 employers to work with us and alerting all employers to act proactively with us or they will in effect, invite visits from our sister agencies in enforcement.

Mr. Alvarez stated that the Consultation Education unit has completed revision of the new pockets guide which is now available as pdf. Now that a budget is in place money will be available early for printing next year, Mr. Alvarez thanked Jerry Bach, along with AG Safe for partnering with consultation on "Aid for Agriculture" (similar to the "Aid for Construction") which was premiered on August 19th before a full house, which will be followed by second such program on November 30th in Southern California. All comments received on these occasions will be carefully reviewed by our staff and we expect that similar efforts of this nature will take place a few times a year in the future and will occur in various locations in Northern, Southern, and Central California.

Mr. Alvarez noted that a handout concerning the workshop for the VVP program is available from Consultation. He also stated that the Consultation Services has long focused on High Hazards particularly with small employers by urging them to enter the Golden Gate program, and then advance to the VVP and SHARP programs when they have met all of the required eight elements of the IIPP. The Golden Gate program not only recognizes the employer but participation in the program helps to empower employees. Together they know the value of the program in promoting health and safety on the job, and not merely that they may merit exemption from inspection in the next higher program. As a result the entry Golden Gate program continues to grow in number and achievements, and their names are listed on our website.

Mr. Alvarez closed by again thanking Mr. Welsh, all his fellow workers and especially his mentors, Dr. John Howard and Dave Bare for the opportunity to be trained and work for the Health and Safety of all California workers. Mr. Alvarez took this occasion to thank his long time associate in the Consultation service, Edna Bellamy, who was in attendance at this meeting and who is also retiring in December. Both Mr. Alvarez and Ms. Bellamy received a generous round of applause from the committee members, staff and attendees in appreciation of their contribution to the work of the Division over a long period of time.

RESEARCH & STANDARDS SAFETY REPORT

Joel Foss, Acting Principal Safety Engineer, reported on the Research and Standards Safety Unit Activity as follows:

Joel Foss spoke briefly about discussions between the Research & Standards Safety Unit, and a manufacturer of a fall protection called "AES Raptor". Raptor manufactures a cart that can be moved around on the roof of a building, to act as an anchor for fall protection safety lines. When the safety lines are shock-loaded, the Raptor cart drops a jagged anchor into the roof membrane.

Foss said that he did not believe that such a system met the requirements of Title 8, for window cleaning and other exterior building maintenance; or for construction work. He said that Title 8 standards require a solid connection to the building itself- a 'substantial structural member' for construction work, and an approved anchor capable of supporting 5000 lbs. for window cleaning and other maintenance work. He wanted to know if anyone in the business community had any experience with the Raptor system- or any other portable fall protection anchors.

If anyone has any experience with such a system, or any thoughts about this issue, please contact Foss at his e-mail address. Talks with AES Raptor are ongoing- the next discussion will be a telephone conference on November 16.

RESEARCH & STANDARDS HEALTH REPORT

Steve Smith, Principal Safety Engineer, Research & Standards Health Unit, provided the following report:

1. The [section 3395 heat illness prevention proposal](#) was adopted by the Standards Board in August and went into effect today November 4th. The original proposal went to public hearing in October, 2009 and a follow up advisory meeting on the proposal was also held last November in Oakland. Also this summer, the Department launched a new outreach campaign of heat training classes and related training materials posted on the Department's [heat website](#). [Amalia Neidhardt](#) is the contact person for heat related information at 916-574-2993.
2. The Standards adopted a new [Section 5197](#), Diacetyl in September and it will go into effect next month. The proposal was developed with the assistance of the 2007 advisory meetings on [Diacetyl](#) and the findings of an ongoing targeted inspection program focused on the flavorings industry. [Mike Horowitz](#) at 510-286-7009 is the contact person for this proposal and related activities the Division is conducting in the flavorings industry.
3. In response to a petition (# 513) granted by the standards board this year, an advisory committee was held in Los Angeles in June and in Oakland last month to consider [amending Section 5193](#) regarding bloodborne pathogens to specifically address health hazards in the adult film industry. The contact person for this advisory committee is [Deborah Gold](#) at 510-286-7006.

4. The section [5155](#) HEAC will meet next month December 14th in Oakland to discuss arsine, gallium arsenide, n-propanol and other priority list substances. Last month the Feasibility Advisory Committee (FAC) met to discuss the HEAC recommended PELs for trichloroethylene, benzyl chloride, wood dust and tetrabromoethane. The contact person for the PEL update process is [Bob Barish](#) at 510-286-7001.

LEGAL UNIT REPORT

Amy Martin, Chief Legal Counsel for DOSH, reported the following:

- 1) The Legal unit continues to be subject to the furlough. Attorneys and Administrative Law Judges are furloughed 3 days a month.
- 2) The DOSH legal unit has formed a committee to draft a policy and procedure for the implementation of AB 2774. DOSH will conduct trainings for all of its employees based on the new policy and procedure in anticipation of the January 1, 2011 implementation date. DOSH intends to provide information to the regulated public at large as well. Ms. Martin urged the committee members and attendees to read the bill as soon as possible, and participate in a dialogue, by sending suggestions to her at: amartin@dir.ca.gov.
- 3) Update on current litigation
 - a. Bautista v. DOSH, a case brought by the United Farm Workers as well as the American Civil Liberties Union and alleging DOSH has insufficiently enforced heat illness standards, remains in discovery stage. DOSH has produced case files for 2009 heat inspections as well as other documents. DOSH expects there to be on-going discussions concerning further productions.
 - b. Harris Construction Co., The Division and United Association Local Union 246 were successful in challenging the Decision of the Appeals Board concerning burdens of proof in the prosecution of a controlling employer. The Appeals Board has appealed the decision of the superior court. Briefs are to be completed in February.
 - c. Patient Zero v. DOSH: The action brought by the ACLU on behalf of an HIV positive actress in the adult film industry continues in state superior court. The ACLU sought and obtained a preliminary injunction preventing DOSH from obtaining any records that might reveal the identity of Patient Zero including records related to her employment history. DOSH continues to challenge the prohibition on the ground that such records are necessary for enforcement of bloodborne pathogen regulations. Both parties are expected to file motions for summary judgment.
 - d. Granite Construction: DOSH has brought a Writ of Mandate based on a decision of the Appeals Board regarding the issuance of citations in the alternative. Rather than issue multiple citations for a single act where more than one regulation would arguably apply, DOSH seeks authority to issue one citation referring to multiple potentially violated regulations in the alternative. The Appeals Board rejected the practice in effect forcing DOSH to continue issuing multiple citations.

APPEALS BOARD REPORT

No representative of the Cal/OSHA Appeals Board was present; hence there is no report from the Board.

STANDARDS BOARD REPORT

In the absence of Marley Hart, Executive Officer of the Cal/OSHA Standards Board, Dave Beals, Attorney for the Board gave the following report:

- 1) Attention of Committee members and attendees was called to the monthly activities sheet, a copy of which is enclosed with these minutes.
- 2) The next meeting of the Cal/OSHA Standards Board will be held in Costa Mesa on November 18, 2010.
- 3) Since the last Cal/OSHA Advisory Committee meeting the following regulations have become effective:
 - a. Hexavalent chromium standard revision-September 13,2010
 - b. Pile driving, pile extraction standard revision-November 26, 2010
 - c. Fabricated decking and plumbing for scaffolds-December 2, 2010

All of the above regulations have been approved by the Office of Administration law and become effective thirty days after they were filed with the Secretary of State's office.

ADDITIONAL HANDOUTS:

- 1) DOSH Inspections and Violations cited by Quarter, from January 1992 through March 2010 (Blue Sheet).
- 2) DOSH On-Site Inspections and Violations cited by Reason, from January through December 2009 (Pink Sheet).
- 3) DOSH On-Site Inspections and Violations cited for Major Industrial Groups, from January through March 2010 (Tan Sheet).

OPEN DISCUSSION

- 1) Elizabeth Traenor, a member of the committee, asked if the Division has been interpreting the Federal Noise standard of 1983 and if so how is it working, and the impact if any of Federal OSHA's 10/19/10 notice to change its interpretation of the 1983 standard. Steve Smith responded that the basic issue is related to the cost of engineering controls and of feasibility as it pertains to hearing conservation controls. If the cost of engineering controls exceeds an efficient hearing conservation program, the employer could implement such a program and avoid going to the engineering control option. This may change if OSHA adopts a new rule. California does not adhere to the federal approach.
- 2) In response to a question from Vicki Wells, a member of this committee, relating to changes in the assessment of penalties for reporting of serious injuries, and further will there be more advisory meetings on this issue. Mr. Welsh replied that this is an on-going issue because of the Labor Code provision that states that we "may" assess a penalty of "not less than" \$5,000 for the reporting of serious violations. Mr. Welsh indicated that a partial change on this matter may be achieved through the rulemaking process.
- 3) Mr. Welsh noted that EFAME criticized Cal/OSHA for its process of assessing repeat violations for a non-fixed worksite by looking at the statewide history of the employer while at the same time the history of a fixed worksite is limited to the region. The audit states that in all cases of this nature, the history of the organization statewide should be the criteria, and Mr. Welsh stated that he agreed with that recommendation.

Along these lines there arises the question as to when you begin to measure the three year period involved as to date of issuance or date that it becomes final by a decision of the Board. If you wait for a final Board decision, the appeals process is lengthy and by the time of a judicial determination, it is likely that a repeat violation citation cannot be issued or sustained because more than three years have gone by.

- 4) Attention was called to the proposed dates and sites for Cal/OSHA. Advisory Committee meeting in 2011. The proposed dates and location were accepted subject to availability of adequate facilities:

January 6, 2011 - Oakland

March 3, 2011 - Los Angeles

May 5, 2011 - Fresno

July 7, 2011 - Oakland

September 1, 2011 - Los Angeles

November 3, 2011 - Oakland

ADJOURNMENT AND NEXT MEETING:

The meeting adjourned at 12:45 p.m. The next meeting of the Committee will be as follows:

DATE: January 6, 2011 (**Thursday**)

TIME: **10:00 a.m.**

PLACE: Elihu Harris State Building
1515 Clay Street-Suite 1304
Oakland, California